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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PAULETTE CALLENDER, Plaintiff and Appellant, v. RICK LOPER, Defendant and Respondent.	E067891 (Super.Ct.No. RIC1507512) OPINION

APPEAL from the Superior Court of Riverside County. Sunshine S. Sykes, Judge. Affirmed.

McElfish Law Firm, Raymond D. McElfish, Lisa Saperstein and Stephen L. Bucklin; Law Offices of Bob B. Khakshooy and Bob B. Khakshooy, for Plaintiff and Appellant.

Richardson, Fair & Cohen and Manuel Dominguez for Defendant and Respondent.

Plaintiff and appellant Paulette Callender was crossing the street when a car driven by defendant and respondent Rick Loper struck her at a low speed. At trial, the jury found that Loper was negligent but that his negligence did not cause Callender's injuries.

The trial court then denied Callender's motion for judgment notwithstanding the verdict (JNOV) and motion for new trial. Because we find no evidence compelling a conclusion that Loper caused Callender's injuries, we affirm the trial court's denial of the JNOV. Because we also find no abuse of discretion in the trial court's denial of the new trial motion, we affirm the judgment.

I. FACTS

While driving to work one afternoon in July 2013, Loper stopped at the intersection of Ross Street and Magnolia Avenue in Riverside. Loper was heading north on Ross and was preparing to make a right turn onto Magnolia. Loper looked to his left to watch for oncoming traffic but did not see Callender, who was on Loper's right and had begun crossing the intersection. Loper made the right turn and struck Callender at a speed of approximately two to three miles per hour. Callender then brought a negligence cause of action.[1]

At trial, Loper acknowledged that his car struck Callender, but the parties disputed other details. Callender believed she fell after being struck, but Loper disagreed. Callender testified that she did not begin to cross the street until Loper stopped, but Loper's attorney then read to the jury a portion of her deposition testimony where she testified that the car never came to a complete stop before hitting her. Callender could not recall what time of day the accident occurred, how many lanes there were on Ross

[1] Although the complaint is not part of the appellate record, we presume Callender alleged negligence because the special verdict form asked whether Loper was negligent.

Street, how fast Loper was driving, or what the traffic conditions were at the intersection on that day. Callender also testified that she never made eye contact with Loper before the collision.

Much of the trial focused on Callender's health before and after the accident. One of Callender's witnesses was Dr. Fardad Mobin, who testified both as a treating physician and as an expert and who had Callender sign a lien allowing him to obtain payment for treatment from any judgment she might recover. Mobin stated that he saw Callender a few months after the accident with complaints of pain in her lower back, neck, knees, and other areas. Mobin then referred Callender to a pain management specialist, who administered a number of epidural injections for her lower back (lumbar spine) and neck (cervical spine) pain. After Callender continued to report experiencing lower back pain, Mobin performed a decompression surgery at the lower-back L4-L5 and L5-S1 levels of Callender's spine in 2015. Mobin opined that the accident was the most likely event causing the nerve injury requiring the injections and surgery. Mobin also opined that Callender will need future surgery for her neck and lower back as a result of the accident.

Loper's witnesses included a medical expert and two doctors who had previously treated Callender. Dr. Ralph Steiger, an orthopedic surgeon, testified that he treated Callender for a fall that occurred in August 2010 while she was at work and that he diagnosed her with a sprain to her lumbar and cervical spine. Dr. Sharon Laughlin, a family physician, testified that she diagnosed Callender with neck pain in January 2012 from a fall; knee pain in February and June 2012; back pain in September 2012 from a

fall; knee and back pain in May 2013 from a fall; and knee pain in early July 2013, approximately two weeks before the accident.

Dr. Ramin Amirnovin, an expert witness, disputed that the accident damaged Callender's spine. Amirnovin opined that Callender had been suffering from spinal stenosis, a narrowing of the spinal canal, since 2011, and that there were no acute changes to her spinal structure as a result of the accident. Amirnovin also opined that Callender has been a candidate for neck surgery since 2011, a candidate since 2011 or 2013 for the L4-L5 decompression surgery that Mobin performed in 2015, and that there was "no reason, zero, that the L5-S1" decompression surgery should have been performed. When asked about what injuries Callender may have suffered from the July 2013 accident, Amirnovin responded that Callender "suffered what we call myofascial injury, which means muscle and tendon injury." As Amirnovin explained: "When you don't find any fractures on MRI, any disrupted discs and majorly disrupted ligaments on MRI, but the patient has substantial muscular pains in the back and the neck, like Mrs. Callender does, that's when you diagnose myofascial injury." Amirnovin also stated that the accident "irritated" Callender's right leg.

The jury, in a special verdict, found that Loper was negligent but that his negligence was not a substantial factor in causing Callender's harm, and the trial court entered judgment in Loper's favor. Callender filed a JNOV motion and a motion for new trial, both of which the trial court denied.

II. DISCUSSION

A. *Applicable Law*

1. *Negligence and Causation*

"The elements of actionable negligence are a duty to use due care and a breach of that duty which proximately causes the plaintiff's injuries." (*Wright v. City of Los Angeles* (1990) 219 Cal.App.3d 318, 344.)

"One of the concepts included in the term proximate cause is cause in fact, also referred to as actual cause." (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1049, fn. omitted.) "California has definitively adopted the substantial factor test . . . for cause-in-fact determinations." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968 (*Rutherford*).) "Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury." (*Id.* at p. 969.) "[A] force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Ibid.*)

"Generally, the burden falls on the plaintiff to establish causation." (*Rutherford*, *supra*, 16 Cal.4th at p. 968.)

2. *Standard of Review*

"On appeal from the denial of a JNOV motion, an appellate court must review the record de novo and make an independent determination whether there is any substantial evidence to support the jury's findings." (*Hirst v. City of Oceanside* (2015) 236 Cal.App.4th 774, 782.) However, "there is a conceptual and substantive distinction within the substantial evidence analysis depending on who has the burden of proof on a

particular issue, which party prevailed on that issue and who appealed." (*Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 965.) Where, as here, "'the issue on appeal turns on a failure of proof . . . the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law.'" (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466 (*Sonic Manufacturing Technologies*).) "'Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached," and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Ibid.*) "The appellate court cannot substitute its factual determinations for those of the trial court; it must view all factual matters most favorably to the prevailing party and in support of the judgment." (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838.) "'"All conflicts, therefore, must be resolved in favor of the respondent."'" (*Ibid.*)

"The denial of a new trial motion is reviewed for an abuse of discretion, except that a trial court's factual determinations are reviewed under the substantial evidence test." (*Minnegren v. Nozar* (2016) 4 Cal.App.5th 500, 514, fn. 7.)

B. *Application*

1. JNOV Motion

Callender had the burden of proving that the accident played more than an infinitesimal or theoretical part in causing her injuries. (See *Rutherford*, *supra*, 16 Cal.4th at pp. 968-969.) The jury found that she did not meet this burden, and the

evidence she presented was not "'"of such a character and weight"'" to compel a finding otherwise. (*Sonic Manufacturing Technologies*, *supra*, 196 Cal.App.4th at p. 466.)

Amirnovin, Loper's expert witness, testified that Callender "suffered what we call myofascial injury, which means muscle and tendon injury," as a result of the accident and that the accident "irritated" her right leg. It does not follow, however, that the jury had to find that Callender was injured even to this limited extent by the accident.[2]

The jury could reasonably have concluded that Amirnovin's statements regarding causation were based solely on Callender's subjective complaints of pain, complaints that the jury could have then discounted or rejected in turn. Amirnovin testified, for instance, that myofascial injury is diagnosed when a patient has muscular pain but an MRI reveals no fractures, disrupted discs, or majorly disrupted ligaments—in other words, when a patient subjectively reports pain but objective imaging studies reveal no substantial injuries. In addition, nothing in the record indicates that Amirnovin based his opinion on anything other than what Callender reported and his statement that myofascial injury is "very common, from whether you fall yourself or someone hits you at low speeds." Amirnovin also concluded, after comparing MRI's taken before and after the accident, that Callender "has suffered no new injuries." Viewing his testimony in this light, Amirnovin did not concede that any of Callender's injuries were caused by the accident.

[2] We use the term "limited" here not to imply that such an injury cannot be severe but in recognition of the fact that Callender sought much more extensive damages for injuries to her lower back, neck, and knees as well.

More importantly, the jury was entitled to reject Amirnovin's testimony on causation while accepting his testimony on other topics. "'As a general rule, "[p]rovided the trier of fact does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted. [Citations.]"'" (*Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 509.) "'This rule is applied equally to expert witnesses.'" (*Ibid.*; see also Judicial Council of California Civil Jury Instructions (CACI) No. 219 ["You may believe all, part, or none of an expert's testimony."].) Moreover, there is no indication that the jury arbitrarily rejected any testimony. In a declaration submitted in opposition to the JNOV, the jury foreperson represented that the jury "discussed the photos of alleged bruises" and noted that "the photos were of such poor quality that [she] could not see any bruising." According to the jury foreperson, other jurors made similar statements, and "after our review of all of the evidence, photos, and testimony presented by both sides all of the jurors . . . agreed not to award any damages to Ms. Callender because she did not meet her burden of proof." By affirming that the jury reviewed "all of the evidence, photos, and testimony presented by both sides," the jury foreperson's statement weighs against any argument that it acted arbitrarily.

We see no other "uncontradicted and unimpeached" evidence in the record (see *Sonic Manufacturing Technologies*, *supra*, 196 Cal.App.4th at p. 466), and Callender does not point us to any. We therefore conclude that the uncontradicted evidence does not compel a finding of causation or a JNOV. As we now discuss, additional review of the record further supports affirmance, and Callender's arguments to the contrary are unpersuasive.

Seen in the light most favorable to Loper (see *Dreyer's Grand Ice Cream, Inc. v. County of Kern*, *supra*, 218 Cal.App.4th at p. 838), Callender's medical history indicates that her lower back, neck, and knee pain, which are her major complaints she claims resulted from the accident, were actually preexisting. Laughlin, Callender's family physician, testified that Callender reported lower back, neck, and knee pain during several visits in an approximately 18-month span leading up to the accident. Steiger, Callender's orthopedic surgeon, diagnosed Callender with a sprain to her neck and lower back after an August 2010 fall. Laughlin's and Steiger's testimony alone may have been enough for the jury to conclude that Callender's injuries were preexisting, but the jury also heard from Amirnovin, an expert who reached the same conclusion. Amirnovin testified that "as early as 2011," Callender had "irritability and early injury" to nerve roots in her neck and that she was a candidate for neck surgery since then. Amirnovin also testified that Callender was a candidate for back decompression surgery "since early 2013 and before even into 2011." From this, the jury could have found that Callender's injuries were preexisting and not caused by the accident.

Moreover, the jury had reason to reject some or all of Callender's evidence. Callender could not recall several facts surrounding the accident, including the time of day or surrounding traffic conditions. Callender also gave inconsistent testimony: at trial, she testified that she did not begin crossing the street until Loper stopped his car, but she testified during her deposition that the car never stopped prior to the accident. Nor was this the only inconsistency in the evidence. Amirnovin, who performed an independent medical examination on Callender, stated that "in August 29th, 2016,

[Callender] told me she had no neck pain radiating to her arm. . . . [¶] But . . . very shortly thereafter on September 7th . . . Dr. Mobin says that the patient has severe neck pain, regularly, and left arm pain." This inconsistency was exacerbated by an answer to written interrogatories where Callender, in response to a question of what injuries she still had in September 2016 that she attributed to the accident, did not mention neck pain. Callender's inability to recall details of the accident and failure to offer consistent testimony gave the jury reason to doubt her evidence.

There was another reason the jury may have given less weight to Callender's evidence: it may have believed Loper, who argued that Callender's doctors performed expensive or unnecessary procedures in order to inflate her—and therefore her doctors'—recovery at trial. Callender testified that she had signed liens with several of her doctors, including Mobin, allowing them to obtain payment from their treatment from any judgment she might recover. According to Amirnovin, if Callender did not win at trial, Mobin stood to lose "$40,000 minimum, up to probably $80,000, because his services were all provided on lien work." Moreover, Amirnovin testified that Mobin's surgery on the L5-S1 level of Callender's spine was "completely unnecessary," and that the claimed costs for other past and future procedures were "not reasonable." For instance, Amirnovin opined that although epidural injections typically cost approximately $750 to $1,500 per injection, Callender was charged $75,000 for six such injections, approximately 10 times the typical amount. Amirnovin characterized Mobin's fees as "exorbitant" and "way above the standard of prices out there." Given what Mobin

charged and his financial stake in the outcome of the case, the jury had reason to doubt his conclusion that the accident caused Callender's injuries.

Callender argues that JNOV is proper because Loper failed to offer any evidence that Callender did *not* sustain injuries from the accident. This incorrectly presumes, however, that Loper had to establish that Callender was not injured or that something other than the accident caused the injuries. Loper did not have to establish the absence of causation; as the plaintiff, *Callender* had the burden of establishing that she was injured as a result of the accident. (See *Rutherford*, *supra*, 16 Cal.4th at p. 968.) In any event, Loper introduced evidence to show that Callender's injuries were preexisting, and the jury could infer from this evidence that she did not sustain injuries from the accident. It is therefore inaccurate to say, as Callender does, that Loper failed to offer any evidence disputing causation.

Callender also argues that JNOV is proper because the jury misunderstood and misapplied the substantial factor test. In support of her JNOV motion, Callender submitted a declaration from a juror who represented that he "misunderstood the meaning of 'substantial factor'" and would have awarded damages for Callender's myofascial injuries if not for the misunderstanding. However, "juror declarations are inadmissible where, as here, they 'at most suggest "deliberative error" in the jury's collective mental process—confusion, misunderstanding, and misinterpretation of the law.'" (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1683.) Even if we were to consider the juror's declaration, the jury voted 11-to-1 that Loper's negligence did not cause Callender's harm; the fact that one additional juror may have voted in the minority would

not have changed the verdict here. (See Cal. Const., art. I, § 16 ["[I]n a civil cause three-fourths of the jury may render a verdict."].) The juror's declaration therefore does not require reversal.[3]

2. *Motion for New Trial*

Callender contends that a new trial is warranted based on four grounds: irregularity of the proceedings (Code Civ. Proc., § 657, subd. 1), jury misconduct (Code Civ. Proc., § 657, subd. 2), excessive or inadequate damages (Code Civ. Proc., § 657, subd. 5), and insufficiency of the evidence (Code Civ. Proc., § 657, subd. 6). In so doing, Callender raises several of the same arguments raised in her JNOV motion. Applying the applicable standard of review (see *Minnegren v. Nozar*, *supra*, 4 Cal.App.5th at p. 514, fn. 7), we find no basis for reversal on these grounds for the reasons discussed above.

Callender's remaining arguments lack merit. First, Callender argues that she was prejudiced because "[a]ccording to [one juror], the jury never discussed" a jury instruction relating to preexisting conditions. That juror, however, stated in his declaration only that *he* "overlooked" a jury instruction on preexisting conditions. There is no evidence that the jury as a whole failed to consider the instruction, so the premise of Callender's argument is erroneous.

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[3] Callender's arguments on appeal also depend in part on a second declaration from the juror, executed a week after the hearing on the JNOV and new trial motions. The trial court did not consider this second declaration, and Callender does not contend that the trial court abused its discretion in doing so. (See Cal. Rules of Court, rule 3.1300(d) [court may, in its discretion, refuse to consider a late filed paper].) We therefore do not consider the second declaration.

Second, Callender contends that "the jury did not want to find liability, but had no reasonable basis for such a verdict, so they elected to hold [Loper] liable, but not to award damages." This contention both lacks factual support as to what the jury's subjective intentions were and misstates the verdict: in finding that the accident was not a substantial factor in causing Callender's injuries, the jury actually concluded that Loper was *not* liable. (See Black's Law Dict. (8th ed. 2004) p. 934, col. 1 ["liable" defined as "[r]esponsible or answerable in law" or "subject to or likely to incur (a fine, penalty, etc.)"].) That is, the "substantial factor" element is necessary for the jury to find causation, and therefore liability, in a negligence case. (See *Rutherford*, *supra*, 16 Cal.4th at pp. 968-969.)

Finally, Callender argues that the trial court should have ordered an additur, requiring a new trial unless Loper agreed to pay damages adequate to cover Callender's "uncontested items of treatment." Because additur is premised on a finding that "an order granting a new trial limited to the issue of damages would be proper" (Code Civ. Proc., § 662.5, subd. (a)), a finding we do not make, no additur is proper here.

3. *Summary*

Callender failed to satisfy her burden of establishing that Loper's vehicle caused her injuries at trial. Testimony from Loper's expert witness does not compel a contrary result. Moreover, based on the evidence presented at trial regarding her medical history, her inability to recall details or give consistent testimony, and her doctor and medical expert's financial stake in this litigation, we find no basis for a JNOV. We also find no error in the trial court's denial of the new trial motion.

III. DISPOSITION

The judgment and the posttrial order denying the JNOV motion are affirmed. Loper is awarded his costs on appeal.

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RAPHAEL
J.

We concur:

SLOUGH
Acting P. J.

FIELDS
J.